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IN THE
COURT OF APPEALS OF INDIANA

ESSIE (OWENS) BAKER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 39A04-0601-CV-49
	)	
PAUL OWENS,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JEFFERSON SUPERIOR COURT
The Honorable Fred H. Hoying, Judge
Cause No. 39D01-0304-DR-119

(Handdown date)

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Essie (Owens) Baker appeals from the trial court's final decree of dissolution of her marriage to appellee-respondent Paul Owens. Specifically, Essie argues that the trial court erred in calculating the value of the marital residence, dividing the marital estate with respect to the parties' camper, refusing to award her spousal maintenance, and refusing to award her attorney fees. Paul cross-appeals, contending that the trial court erred in calculating the value of his pension.

Finding, among other things, that the trial court erred in including the value of a third-party-owned residence in the marital estate, we affirm in part, reverse in part, and remand with instructions to: (1) remove all references to the $30,000 valuation of the Sharon Hill residence from the dissolution decree, calculate the value of Paul's continued residence in the home, divide that amount equally between Paul and Essie, and amend the dissolution decree accordingly; (2) amend the dissolution decree to reflect that the parties' camper is awarded in kind to Paul, that $1250 should not have been deducted from Essie's cash award, and that $1250, representing half of the camper's value, should be awarded to Essie, resulting in a total award of $2,500 to Essie; (3) calculate the amount of spousal maintenance that Paul is required to pay to Essie and amend the dissolution decree accordingly; and (4) amend the dissolution decree to reflect that the marital portion of Paul's pension, which will be divided equally between Paul and Essie, is worth $55,161.25.

FACTS

Paul and Essie were married in Jefferson County on July 3, 1994,[1] and separated on April 4, 2003. No children were born of the marriage. Essie has been unemployed since 1997, following a back injury she sustained while working. She has undergone two back surgeries and has had two pump implants surgically inserted to administer the painkiller dilaudid. During her second back surgery, a problem developed that resulted in paralysis of her left leg. Essie has also suffered two strokes, causing speech and memory difficulties.

Beginning in 1998, Essie began receiving Social Security disability benefits in the monthly sum of $512. When she was approved for Social Security benefits, she received back pay in the amount of $11,479. She also receives public assistance in the form of subsidized housing, Medicaid, food stamps, and utility bill assistance.

At all relevant times, Paul has been employed as a union electrician with a regular hourly wage of approximately $20. Paul testified that in each of 2003 and 2004, he earned approximately $30,000, but offered no tax returns documenting that assertion. His tax return for 2002 revealed income in excess of $60,000. Paul had two pension accounts. The first, #481, was worth approximately $28,963.04 in June 2004. Paul testified that he only contributed to #481 prior to the marriage, making no further contributions after the parties were married. The second, #369, had a balance of $67,157.60 on April 30, 2003, the day

[1] In the final decree of dissolution, the trial court found that the parties were married on July 3, 2003, presumably based upon a statement to that effect in Essie's dissolution petition. Both parties testified at the hearing, however, that they were married on July 3, 2004. Moreover, the dissolution of Paul's prior marriage was not final until October 3, 2003. Petr. Ex. 6. It is apparent, therefore, that the petition erred in stating and the trial court erred in finding that the parties were married on July 3, 2003.

Essie filed the dissolution petition. At the time the parties were married, the balance of #369 was between $9,688.08 and $13,177.48.

When Essie and Paul met, Essie owned a residence to which Paul contends he made substantial improvements with his own time and money. In 2001, Essie sold the residence, receiving net proceeds of $39,712.87 from the sale.

During the parties' marriage, they lived in a Jefferson County residence on Sharon Hill Road. The title owners of the Sharon Hill residence were Paul's parents, and the original purchase price was $13,000. Essie testified that the parties invested approximately 90% of her Social Security back pay and the net proceeds from the sale of her prior residence in improvements to the Sharon Hill residence. Essie testified that she believed the Sharon Hill residence to be worth $175,000. Paul testified that he believed the Sharon Hill residence to be worth $50,000.

The parties also purchased a Prowler Lynx camper, valued at $2,500, during the marriage. During the pendency of the dissolution proceedings, Paul traded in the Prowler for another camper.

On April 30, 2003, Essie filed a petition for dissolution of marriage. The provisional order entered by the trial court contained a provision requiring that the parties would allow the dissolution to pend through July 31, 2004, so that the parties' ten-year marriage would entitle Essie to Social Security retirement benefits based on Paul's earnings when she reaches retirement age in approximately ten years.

Following a final hearing, on October 17, 2005, the trial court issued a decree dissolving the marriage of Paul and Essie. The trial court, on its own motion, entered findings of fact and conclusions of law, providing, in relevant part, as follows:

> The parties were married on July 3, 1993 [sic]. . . . .
>
> ***
>
> [Essie] is presently receiving both social security and medicaid. The Court presumes that she qualifies as a person without assets so as to qualify for medicaid. [Essie] is totally disabled and unable to pursue employment.
>
> The state of ownership of personal property of the marriage is totally confusing. Evidence presented at trial of the personal property contains massive deception. The Court finds that the personal property, except what is explicitly found in this order, shall be [divided] in accordance with the provisional order. Therefore, each person shall be awarded the possession and ownership of the personal property in their possession. That property the Court considers equally divided.
>
> ***
>
> The Court awards the Prowler Lynx camper to [Essie]. The value of the camper is $2,500.00. There was $1,000.00 of marital assets in bank accounts on the date of dissolution. The Court awards the bank accounts to [Essie].
>
> [Paul] accumulated $60,000.00 during the marriage in the [#369 account]. [Essie] is entitled to one-half of that amount. Thirty-thousand dollars of the retirement is set over to [Essie].
>
> The facts concerning the real estate are as troubling as almost every other aspect of this dissolution. When reviewing as [sic] the evidence, i.e., the post-dissolution decree, the provisional order, all circumstances, it is apparent that this real estate is an asset of the marriage. The property has been shielded by keeping the title in the names of the parents of [Paul]. The evidence clearly places equitable ownership of the property in the marriage.
>
> The value of the real estate and how much value that real estate had when brought into the marriage has never been established by evidence.

> The residence has little value. The marital value of the property is $30,000.00 to be split evenly. [Paul] shall purchase the property and pay half its value minus the cash and Lynx trailer value. That amount is $13,250.00 and must be paid to [Essie] within thirty days.
>
> Since [Essie] has assets, she shall pay her own attorney's fees. Since she has significant assets, no maintenance will be required. [Essie] receives social security benefits based upon [Paul's] earnings.

Appellant's App. p. 144-45. Essie now appeals the valuation of the Sharon Hill residence, the distribution of the Prowler camper, the denial of spousal maintenance, and the refusal to award her attorney fees. Paul cross-appeals the valuation of his pension.

DISCUSSION AND DECISION

I. Standard of Review

Where, as here, the trial court enters specific findings of fact and conclusions sua sponte, we apply the following two-tiered standard of review: whether the evidence supports the findings, and whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, i.e., when the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence nor assess the credibility of witnesses, and consider only the evidence most favorable to the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005).

In a marital dissolution action, the trial court must divide the marital property in a "just and reasonable manner." Ind.Code § 31-15-7-4(b). "Property," in this context, includes property owned by either spouse prior to the marriage, acquired by either spouse in his or her own right, or acquired by the joint efforts of the spouses. I.C. § 31-15-7-5.

The division of marital assets is committed to the trial court's sound discretion, whose determinations in that regard will be reversed only for an abuse of that discretion. DeSalle v. Gentry, 818 N.E.2d 40, 44 (Ind. Ct. App. 2004). A party challenging the division of marital property "must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal." Id.

II. Appeal

A. Valuation of the Sharon Hill Residence

Essie first argues that the trial court erred in calculating the value of the Sharon Hill residence to be $30,000. She argues that this value was not within the range of evidence, inasmuch as Paul testified that he believed the home to be worth $50,000, while Essie testified that she believed it to be worth $175,000. The valuation of property in a dissolution action is within the trial court's sound discretion. DeSalle, 818 N.E.2d at 45.

It is well established that an equitable interest in real property that is titled in a third party's name, even if claimed by one or more of the divorcing parties, should not be included in the marital estate. See In re Marriage of Dall, 681 N.E.2d 718, 721-22 (Ind. Ct. App. 1997) (residence owned by wife's parents improperly included in marital estate even though parents planned to convey title to wife on some future date and husband and wife paid utility bills, property taxes, and homeowner's insurance); Hacker v. Hacker, 659 N.E.2d 1104, 1106-07 (Ind. Ct. App. 1995) (family farm owned by husband's parents, which husband expected to inherit, upon which husband and wife lived rent-free during the marriage, and on

which husband and wife spent own money to improve, could not be included in the marital estate); Moore v. Moore, 482 N.E.2d 1176, 1179 (Ind. Ct. App. 1985) (cars owned by wife's father were improperly included in marital estate). Thus, where a party's purported equitable interest in the residence is indeterminate and not vested, the trial court may not include the residence or its full market value in the marital estate. Dall, 681 N.E.2d at 722-23. Rather, it may consider only the value of the residing spouse's continued residence in the home. Id.

Here, the trial court observed that the Sharon Hill residence was owned, in name, by Paul's parents. It went on to conclude, however, that the real estate is "an asset of the marriage" and that Paul and Essie had "equitable ownership of the property . . . ." Appellant's App. p. 145. Ultimately, the trial court found that the "value of the real estate" had not been established by evidence, concluding that "[t]he residence has little value. The marital value of the property is $30,000 to be split evenly." Id.

Pursuant to Dall and the other cases cited above, the trial court erred in considering what it determined to be the value of the Sharon Hill residence, based on Paul and Essie's equitable ownership interest, in the marital estate. We remand, therefore, with instructions to remove the $30,000 valuation of the Sharon Hill residence from the dissolution decree, calculate the value of Paul's continued residence in the home, divide that amount equally between Paul and Essie, and amend the dissolution decree accordingly.

B. Distribution of the Camper

Essie next argues that the trial court erred in awarding her the Prowler Lynx camper in kind and deducting half of its value from her cash award. Specifically, she emphasizes that Paul traded this vehicle in for another camper while the dissolution proceedings were pending. Essie contends that these circumstances resulted in a "double recovery" for Paul, inasmuch as he retained half of the value of the Prowler Lynx camper—$1250—in addition to the Prowler's value as a trade-in. Appellant's Reply Br. p. 6. We agree. Rather than awarding the camper to Essie and half of its value to Paul, the trial court should have awarded the camper in kind to Paul and half of its value to Essie.

Paul argues that the trial court divided the camper in this way in recognition of the fact that Essie returned the Sharon Hill residence to Paul in an unlivable condition, necessitating his purchase of a camper in which he could reside. There is no support for this conclusion in the trial court's dissolution decree, however. Its only finding with respect to the Prowler was the camper's value—$2500—which it then divided as described above. Furthermore, there is no evidence suggesting that Paul could not have resided in the Prowler. We cannot conclude, therefore, that the trial court's findings with respect to the camper support its division of the vehicle. We remand, therefore, with instructions to amend the dissolution decree to reflect that the Prowler Lynx camper is awarded in kind to Paul, that $1250 should not have been deducted from Essie's cash award, and that $1250, representing half of the camper's value, should be awarded to Essie, resulting in a total award of $2500 to Essie.

C. Spousal Maintenance

Essie next argues that the trial court erred in refusing to award spousal maintenance to her. Specifically, she argues that after finding that she is totally disabled and unable to pursue employment, the trial court was required to order spousal maintenance absent extenuating circumstances not present in this situation. Indiana Code section 31-15-7-2(1) provides, among other things, that if a trial court

> finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.

In Cannon v. Cannon, our Supreme Court noted that although the language of the spousal maintenance statute quoted above "appears to give the trial court some discretion not to award maintenance even where it makes such finding, we believe the strict construction principles applicable in this area narrowly limit that discretion as well." 758 N.E.2d 524, 526 (Ind. 2001). The Cannon court went on to hold as follows:

> We agree with the Court of Appeals that, given the language of the statute, a maintenance award is not mandatory. But as we pointed out at the outset of this discussion, the Legislature has narrowly circumscribed the authority of courts to award spousal maintenance. While such factors as payments made by one spouse to another pursuant to the terms of provisional orders and depletion of marital assets are appropriate considerations in dividing the marital pot, see Ind.Code § 31-15-7-5 (1998), we believe that the statutory scheme for spousal maintenance does not admit of such considerations. Where a trial court finds that a spouse is physically or mentally incapacitated to the extent that the ability of that spouse to support himself or herself is materially affected, the trial court should normally award incapacity maintenance in the absence of extenuating circumstances that directly relate to the criteria for awarding incapacity maintenance.

Id. at 527 (emphasis added). In assessing whether or not to award maintenance, the central inquiry is "whether the incapacitated spouse has the ability to support himself or herself." McCormick v. McCormick, 780 N.E.2d 1220, 1224 (Ind. Ct. App. 2003). Furthermore, the spouse's "degree of employability is an inextricable factor in this determination." Id. at 1224 n.6.

Here, as noted above, the trial court found that Essie is "totally disabled and unable to pursue employment." Appellant's App. p. 145. It went on to hold that "[s]ince she has significant assets, no maintenance will be required. [Essie] receives social security benefits based upon [Paul's] earnings." Id.

Our review of the record reveals no evidence supporting a conclusion that Essie has significant assets. To the contrary, the evidence establishes that she receives monthly Social Security disability benefits in the amount of $512 and public assistance for her rent payments and utility bills, food stamps, and Medicaid. Appellant's App. p. 38, 223, 225-27, 304. Given that Essie is nearly ten years away from being entitled to collect Social Security retirement benefits based upon Paul's earnings—which, incidentally, will in no way affect the amount of benefits he is entitled to receive—that cannot be a factor in determining whether she is currently able to support herself.[2] The same is true for her right to collect her share of Paul's pension. And although the cash award of $13,250 pursuant to the dissolution decree seems substantial when compared to nothing, when considered in terms of its

[2] Of course, the trial court is entitled to revisit the spousal maintenance order and modify it at any time if there are changed circumstances, such as Essie's receipt of Social Security retirement benefits and/or her share of

capability of supporting Essie over the next ten years, we cannot conclude that it amounts to a significant asset. As an aside, we also note that the record reveals that Paul earns over $20.00 per hour and that in the year prior to the filing of the petition for dissolution, he earned $60,000.

Inasmuch as the trial court found that Essie is totally disabled and unable to pursue employment, and inasmuch as the incapacitated spouse's degree of employability is an inextricable factor in considering her ability to support herself, we conclude that Essie's incapacity materially affects her ability to support herself. Because there are no extenuating circumstances that directly relate to the statutory criteria for awarding spousal maintenance, we are compelled to find that the trial court erred in refusing to award her spousal maintenance. We remand, therefore, with instructions to calculate the amount of spousal maintenance that Paul is required to pay to Essie and to amend the dissolution decree accordingly.

D. Attorney Fees

Finally, Essie argues that the trial court erred in refusing to award her attorney fees. In a dissolution action, the court "may order a party to pay a reasonable amount . . . for attorney fees . . . ." Ind. Code § 31-15-10-1. When reviewing an award of attorney fees in connection with a dissolution decree, we will reverse only for an abuse of discretion. Augspurger v. Hudson, 802 N.E.2d 503, 512 (Ind. Ct. App. 2004). When assessing attorney

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Paul's pension, that make the previous maintenance order unreasonable. Lowes v. Lowes, 650 N.E.2d 1171, 1174 (Ind. Ct. App. 1995).

fees, the court may consider such facts as the amount of assets awarded to the parties, the relative earning ability of the parties, and which party initiated the action. Selke v. Selke, 600 N.E.2d 100, 102 (Ind. 1992).

Here, the record reveals that Essie initiated the action and that she was awarded a cash payment of $13,250 and a $30,000 interest in Paul's pension. Additionally, the parties agreed to allow the dissolution proceeding to pend until they had been married for ten years so that Essie will one day be able to collect Social Security retirement benefits based upon Paul's income. We acknowledge the large disparity in the parties' respective earning ability, but the ultimate determination on this issue was within the trial court's sound discretion. Under these circumstances, we conclude that the trial court did not abuse its discretion in refusing to award attorney fees to Essie.

II. Cross-Appeal

Paul cross-appeals, arguing that the trial court erred in calculating the value of his pension. As with other matters in a dissolution proceeding, this determination is reviewed for an abuse of discretion. Tracy v. Tracy, 717 N.E.2d 183, 185 (Ind. Ct. App. 1999).

In the dissolution decree, the trial court explicitly stated that it was dividing only the amount of Paul's pension that accumulated during the marriage. See Breeden v. Breeden, 678 N.E.2d 423, 425 (Ind. Ct. App. 1997) (awarding premarital portions of husband's pensions to husband and including the portion accumulated during the marriage in the marital pot). The trial court calculated that amount to be $60,000. It arrived at this figure by beginning with the total value of the pension on April 3, 2003—$67,157.60—and subtracting

the approximate value of the pension at the time the parties were married, which the trial court apparently found to be $7,157.60.

The evidence in the record establishes that Paul's pension account balances for fund years ending October 31, 1992, 1993, and 1994, were as follows:

10/31/1992:	$5,736.77
10/31/1993:	$9,688.08
10/31/1994:	$13,177.48

Resp. Ex. B. Although there is not an exact balance for July 3, 1994, when the parties were married, the account's value on that date was between $9,688.08 and $13,177.48. If the difference in value between the 1993 and 1994 balances is prorated, the balance of the account in July 1994 was approximately $12,014.35.[3] Thus, the value of the marital portion of Paul's pension is $55,161.25—the total value of the account on April 3, 2003, $67,157.60, less Paul's premarital contributions thereto, totaling $12,014.35.

We assume that the trial court based its conclusion that the premarital portion of Paul's pension totaled $7,157.60 upon the incorrect assumption that the parties were married on July 3, 1993 rather than on the same date in 1994. If they had, in fact, been married on July 3, 1993, then $60,000 would be an appropriate valuation of Paul's pension. But inasmuch as they were married in 1994, the evidence leads to a different conclusion, namely, that the marital portion of Paul's pension is worth $55,161.25. We remand, therefore, with

[3] The difference between $13,177.48 and $9,688.08 is $3,489.40. There are eight months between October 31 and July 3, and eight-twelfths of $3,489.40 is $2,326.27. Adding $2,326.27 to $9,688.08 equals $12,014.35.

instructions to amend the dissolution decree to reflect that the marital portion of Paul's pension, which will be divided equally between Paul and Essie, is worth $55,161.25.[4]

CONCLUSION

In sum, we have concluded as follows: (1) the trial court erred in including the value of the Sharon Hill residence, owned by Paul's parents, in the marital estate; (2) the trial court erred in awarding the Prowler Lynx camper in kind to Essie when Paul traded in the camper while dissolution proceedings were pending; (3) the trial court erred in refusing to award spousal maintenance to Essie after finding that she was totally disabled and unable to pursue employment; (4) the trial court did not abuse its discretion in refusing to award attorney fees to Essie; and (5) the trial court improperly valued the marital portion of Paul's pension by basing its calculations on an assumption that the parties were married in 1993 rather than in 1994.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to: (1) remove all references to the $30,000 valuation of the Sharon Hill residence from the dissolution decree, calculate the value of Paul's continued residence in the home, divide that amount equally between Paul and Essie, and amend the dissolution decree accordingly; (2) amend the dissolution decree to reflect that the parties' camper is awarded in kind to Paul, that $1250 should not have been deducted from Essie's cash award, and that

[4] In her reply brief, Essie raises a new argument for the first time, namely, that the trial court ignored another pension account in valuing the amount to be divided between the parties. Initially, we note that this argument is waived. Naville v. Naville, 818 N.E.2d 552, 553 n.1 (Ind. Ct. App. 2004). Waiver notwithstanding, the undisputed evidence reveals that pension account #481 existed before Paul met and married Essie and that

$1250, representing half of the camper's value, should be awarded to Essie, resulting in a total award of $2,500 to Essie; (3) calculate the amount of spousal maintenance that Paul is required to pay to Essie and amend the dissolution decree accordingly; and (4) amend the dissolution decree to reflect that the marital portion of Paul's pension, which will be divided equally between Paul and Essie, is worth $55,161.25.

Paul made no contributions to that account after they were married. Consequently, the trial court did not err in declining to award Essie half of account #481.